BEFORE THE

ILLINOIS COMMERCE COMMISSION

In the Matter of:	)	
	)	
Petition for Arbitration of XO	)	
ILLINOIS, INC. Of an Amendment to	)	Docket No. 04-0371
an Interconnection Agreement with	)	
SBC ILLINOIS, INC. Pursuant to	)	
Section 252b) of the Communications	)	
Act of 1934, as Amended	)	

STAFF OF THE ILLINOIS COMMERCE COMMISSION'S
REPLY BRIEF

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The Staff of the Illinois Commerce Commission (the "Staff"), by and through its counsel, and pursuant to Section 200.800 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.800), respectfully submits its Reply Brief in the above-captioned matter.

XO Issue No. 1 – Routine Network Modifications

This issue continues, in the Staff's view, to be a vexatious one. XO and SBC agree that SBC is required to undertake routine network modifications, and further agree that SBC is entitled to recover – in some manner – the costs incurred in making such modifications. XO IB at 4; SBC IB at 2-3. The problems that the Commission faces in resolving this issue are: (1) the parties have presented no evidence regarding what, exactly, constitutes – or, perhaps just as important, does not constitute – a routine network modification; and (2) the parties have presented no probative evidence – and little argument – upon the issue of whether SBC in fact recovers the costs incurred in making routine network modifications in its UNE loop rates. *See, generally,* XO IB at 4-6; SBC IB at 2-9. SBC states that it does not recover costs for certain modifications, specifically the addition of doublers and repeaters to a loop. SBC IB at 3. It then urges the Commission to conclude from this that SBC does not recover the costs of many routine modifications. *See* Id. at 3-4. (SBC states "…use of ICB pricing will allow it to determine whether the costs associated with any particular XO request are or are not already included in the UNE loop price"; "the Commission should adopt SBC Illinois' proposed language, which requires XO to compensate SBC Illinois on an individual case basis for the routine network modification SBC Illinois performs at XO's request, because the costs of such activities are not automatically always recovered in SBC Illinois' other rates.") XO, on the other hand, makes what SBC accurately characterizes as the "blanket assumption", *see* SBC IB at 4, that costs associated with any routine network modifications are recovered in UNE loop rates. XO IB at 3-4.

XO's conclusion is unsupported and SBC's is flawed. Adding doublers and repeaters to loops very likely incurs additional costs for the excellent reason that loops in a forward-looking network ought not to have them in the first place. SBC IB at 3. Accordingly, SBC's UNE loop rates will not, by definition, include costs associated with these particular devices, which are unnecessary and therefore non-existent in a forward looking network.

The Staff noted in its Initial Brief that the Commission was hindered in the parties' failure to submit evidence and detailed argument on this point, and recommended that the parties supplement their respective showings in their Reply Briefs, so that the Commission has some basis to resolve the matter. Staff IB at 33. The Staff sees no reason to alter this recommendation at this time.

In its Initial Brief, the Staff further noted that the Commission has substantial latitude in allocating the burden of proof on this issue. Staff IB at 30-33. This decision may prove outcome determinative.

XO Issue No. 2 – Commingling

XO argues that the Commission should refuse to permit SBC to implement its "Lawful UNEs" list, which implementation effectively permits SBC to withdraw a UNE based upon its unilateral legal interpretation that the UNE in question need no longer be offered. XO IB at 7-8. SBC does not specifically argue in favor of its "Lawful UNEs" list in this section of its Initial Brief. *See* SBC IB at 9-13. The Staff wholeheartedly concurs in XO's opposition to the implementation of the Lawful UNEs" list, for the reasons set forth in its Initial Brief. *See* Staff IB at 37.

XO further argues that SBC's proposed restrictions on commingling have no basis in the *Triennial Review Order*, or indeed in the U.S. Supreme Court's Verizon v. FCC[1] decision. XO IB at 8-9. SBC does not dispute that the Supreme Court did not address commingling in its Verizon v. FCC decision, but nonetheless contends that the Court "recognized [certain "sensible limitations"] … in the context of an ILEC's obligation to combine UNEs on behalf of a CLEC. Those limitations apply equally to an ILECs [sic] obligation to commingle UNEs and wholesale service on behalf of a CLEC (or to perform functions necessary for the CLEC to complete the actual commingling)." SBC IB at 10-11. The "sensible limitations" SBC proposes include exempting SBC from the commingling requirement "where doing so would not be technically feasible, would impair 'network reliability or security,' would impair SBC Illinois' ability to maintain the

[1] Verizon v. FCC, 535 U.S. 467, 152 L. Ed. 2d 701, 122 S.Ct. 1646 (2002),

performance of its network, or would undermine the ability of other CLECs to access UNEs or interconnect with SBC Illinois' network[.]" Id. at 11.

SBC's proposal overreaches considerably. The Supreme Court did indeed, in upholding existing FCC rules requiring ILECs to combine UNEs for requesting CLECs, cite with approval FCC rules limiting that ILEC obligation to those circumstances where such combination is technically feasible, and will not discriminate against other carriers by impeding their access to the network.[2] Verizon v. FCC, 535 U.S. at 535-36; 152 L.Ed. 2d at 752-53; 122 S.Ct at 1685-86. However, as XO correctly notes, this was in the context of UNE combinations; the Supreme Court made no reference to commingling, and FCC rules – which, it must be remembered that the Supreme Court upheld in Verizon v. FCC -- include no similar requirement for commingling. *See* 47 C.F.R. §51.301 *et seq*. (FCC regulations governing interconnection make no reference to any imposition of a similar obligation upon commingling of UNEs and non-UNEs).

Moreover, SBC's proposal, while not unreasonable on its face, offers ample opportunity for questionable practices. SBC's proposal appears to arrogate to SBC itself the determination of what constitutes technical infeasibility, an impediment to interconnection, or an impairment of network reliability or security. The FCC itself noted that ILECs might use technical infeasibility as a basis for refusing to undertake UNE combinations, and accordingly determined that an ILEC contending that a combination

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[2] The FCC rule in question provides, in relevant part, as follows:

Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network, provided that such combination:

(1) Is technically feasible; and

(2) Would not undermine the ability of other carriers to obtain access to unbundled network elements or to interconnect with the incumbent LEC's network.

47 C.F.R. §51.315(c)

is technically infeasible has the burden of showing that such is indeed the case. 47 C.F.R. §51.315(e). Moreover, it would, in practical terms, be extraordinarily difficult for XO to have any idea whether any request to commingle UNEs it makes would impair network reliability or security, would impair SBC's ability to maintain the performance of its network, or would undermine the ability of other CLECs to access UNEs or interconnect with SBC's network. Thus, SBC's contract proposal would afford it considerable latitude to frustrate entirely proper commingling. Accordingly, SBC's proposal should be rejected.

XO argues that SBC is required to permit it to commingle Section 271 UNEs with other UNEs. XO IB at 9. It contends that the *Triennial Review Order's* conclusions with respect to this issue are "uncertain at best". Id. SBC invests the *Triennial Review Order* with much greater certainty, and argues that it specifically does not require ILECs to commingle Section 271 UNEs with other elements. SBC IB at 9-10.

Staff concurs in SBC's assessment with respect to this issue, for the reasons set forth in its Initial Brief. Staff IB at 35-37.

XO argues that it should be permitted to request commingling of UNEs without resorting to the bona fide request (hereafter "BFR") process. XO IB at 10. XO contends that commingling involves little more than the alteration of billing records, which can be readily accomplished outside of the BFR process. Id. XO asserts that the BFR process is intended for those circumstances where a CLEC makes a "unique, unanticipated request" for UNEs or services, and the process is therefore lengthy and unwieldy. Id.

SBC argues that its BFR process is the "time-tested, Commission-approved way for SBC Illinois to respond to specialized requests from CLECs." SBC IB at 11. It contends, somewhat speculatively, that the "arrangements [of UNEs] that might be requested by XO is limited only by the imagination of XO personnel." Id. at 12.

This dispute highlights the burdens the parties have imposed upon the Commission in resolving this case. XO contends that all requests are likely to be routine changes, repeatedly and routinely undertaken by SBC personnel, which will involve nothing more than a billing change. SBC argues that all requests are likely to be unique, complex undertakings that will tax the abilities of SBC personnel. The Staff posits that neither party is entirely correct; XO is likely to submit both simple, standard requests, and complex, non-standard ones. It is, it seems to the Staff, a relatively simple matter to determine which requests fall into the former category and which the latter, provided that one knows something about what XO is likely to request. However, no attempt has been made by either party to bring forward any evidence in this regard. Accordingly, what constitutes a routine request, for which a billing change alone is necessary, and what constitutes a complex request, for which a BFR might be proper, cannot be determined from this record.

On balance, the Staff is of the opinion that XO "billing change" argument is likely to be accurate with respect to a great majority of requests. However, this is far from certain based upon the record. The Staff observes that the Commission may be compelled to decide this issue based upon which party is found to have the burden of proof.

XO next argues that SBC should not be permitted to assess non-recurring charges for commingling over and above those assessed for the individual UNEs. XO IB at 11. It contends that the *Triennial Review Order* does not allow for, or even contemplate, such costs, authorizing instead a regime of monthly recurring charges for commingling. Id. It finally observes, as is doubtless the case, that the record contains no evidence regarding SBC's costs. Id.

SBC contends that it is entitled to recover the costs it incurs in commingling UNEs and services for XO. SBC IB at 12. It urges the Commission not to interpret the FCC's silence regarding non-recurring charges for commingling as assent to the proposition that non-recurring costs are not incurred or should not be recovered. Id. It further urges the Commission to resort to long-standing cost-causation principles and permit it to recover its costs. Id. at 11-12.

Neither party makes much of a showing here, but XO's argument appears to prevail. It states correctly that SBC has introduced no evidence regarding the costs it incurs in commingling UNEs and services for CLECs. While SBC urges the Commission to rely upon long-standing cost-causation principles, it is significant that one such principle – of which SBC is, or should be, painfully aware – is that the Commission permits recovery of only those costs that an ILEC demonstrates that it incurs. *See, e.g.,* Order, Illinois Commerce Commission On Its Own Motion: Investigation into the compliance of Illinois Bell Telephone Company with the order in Docket 96-0486/0569 Consolidated regarding the filing of tariffs and the accompanying cost studies for interconnection, unbundled network elements and local transport and termination and regarding end to end bundling issues, ICC Docket No. 98-0396 (October 16, 2001) (hereafter "TELRIC II Order") (SBC not permitted to recover certain non-recurring costs because it failed to adequately support them); Final Order, Illinois Commerce Commission On Its Own Motion vs. Illinois Bell Telephone Company; et al., Investigation into Non-Cost Based Access Charge Rate Elements in the Intrastate Access Charges of Incumbent Local Exchange Carriers in Illinois; Illinois Commerce Commission On Its Own Motion, Investigation into Implicit Universal Service Subsidies in Intrastate Access Charges and to Investigate how these Subsidies should be Treated in the Future; Illinois Commerce Commission On Its Own Motion, Investigation into the Reasonableness of the LS2 Rate of Illinois Bell Telephone Company, ICC Docket Nos. 97-0601; 97-0602; 97-0516 (Consolidated) (March 29, 2000) (Verizon not permitted to recover its alleged cost inasmuch as it refused to provide cost studies support its access charges). Here, SBC seeks to recover a new species of costs – without the least scintilla of cost support. It should not be permitted to recover these costs until it demonstrates their existence, magnitude, and the manner in which they are incurred.

XO Issue No. 3 – Combinations [Withdrawn]

XO Issue No. 4 – Conversions

XO argues that SBC is required to convert services or groups of services to UNEs upon request. XO IB at 12-13. XO asserts that SBC's proposal would substantially limit XO's right to conversions. Id. XO further argues that the *Triennial Review Order* mandates that SBC must perform these conversions without charge, inasmuch as ILECs routinely perform such services for their own customers without charge. Id. XO next contends that SBC should be required to allow ordering of conversions through a so-called "ASR" process, through which XO alleges that it currently places orders for other services. Id. XO further objects to SBC-proposed contract language, which, XO alleges, would permit SBC to reconvert UNEs to wholesale services if it unilaterally determines XO has ceased to meet eligibility criteria. Id. at 14.

SBC argues that XO is not entitled as a matter of law to special access-to-UNE conversions. SBC IB at 14 *et seq*. SBC contends that the District of Columbia Circuit Court of Appeals' decision in United Stated Telecom Ass'n v. FCC[3] vacated all rules requiring ILECs to perform any conversions. Id. SBC argues that the USTA II decision is binding in this proceeding and the Commission should apply it. Id.

SBC further objects to XO's proposal that SBC forgo charges for conversions. SBC IB at 15. SBC argues that it should be permitted to recover service order and record change charges. Id. Likewise, SBC contends that, in the case of conversions from wholesale services to UNEs, it should be permitted to assess early termination penalties where the contract pursuant to which the wholesale services are provided calls for such penalties. Id. SBC likewise objects to XO's assertion that SBC cannot be permitted to unilaterally reconvert UNEs to wholesale service if eligibility criteria are no longer met. Id. at 19-20. SBC contends that the *Triennial Review Order* specifically authorizes this. Id.

It appears to the Staff that the parties are very much at odds regarding whether the Commission should render its award in this proceeding based upon the law as it existed prior to the USTA II decision, or the law as it currently exists, taking the USTA II decision into account. The Staff sees no reason for the Commission not to consider the USTA II decision in this proceeding. The USTA II decision arguably constitutes a change of law within the meaning of the existing interconnection agreement between

[3] United Stated Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) (hereafter "USTA II")

and among the parties. The failure to consider it would, at the very least, constitute a misuse of the Commission's and the parties' resources. Assuming the Commission is to arbitrate disputes arising from changes of law that affect interconnection agreements, it must have the latitude, at the very least, to resolve those disputes based upon all relevant changes of law that have occurred.

The USTA II decision appears to favor SBC's position in this dispute, at least with respect to special access to EEL conversions. With respect to such conversions, the court found that:

> **The ILECs make an independent attack on the Commission's decision to allow "conversions" of wholesale special access purchases to UNEs. As we discussed in the section on wireless carriers,** the presence of robust competition in a market where CLECs use critical ILEC facilities by purchasing special access at wholesale rates, i.e., under §251(c)(4), precludes a finding that the CLECs are "impaired" by lack of access to the element under §251(c)(3). **We realize that this might create anomalies, as CLECs hitherto relying on special access might be barred from access to EELs as unbundled elements, while a similarly situated CLEC that had just entered the market would not be barred. On the other hand, if history showed that lack of access to EELs had not impaired CLECs in the past, that would be evidence that similarly situated firms would be equally unimpaired going forward. Because we have already determined that we must remand to the Commission, given the invalidity of the line it drew between qualifying and non-qualifying services, the Commission can consider and resolve any potential anomaly on remand.**
>
> USTA II, 359 F. 3d at 593 (emphasis added)

This holding appears to the Staff to apply only to special access to EEL conversion, which are presumably a subset – although probably a substantial subset – of the universe of wholesale to UNE conversions. However, this passage directly contradicts XO's assertion that "[n]othing in USTA II addresses conversions, much less relieves SBC of any obligation to undertake such conversions." XO IB at 13. Thus, XO's assertions should be dismissed to the extent that they require conversion of special access circuits to EELs.[4]

With respect to charges associated with service ordering and conversions, the Staff is of the opinion that SBC is entitled to charge a record change charge of some sort. *See* Staff IB at 43. In addition, the Commission has authorized SBC to assess a project administrative charge for a special access to UNE or private line to UNE conversions, and also to reference "other charges" which include termination liability, damages, and early termination charges. See Order at 213-14, Illinois Bell Telephone Company: Filing to Increase Unbundled Loop and Nonrecurring Rates, ICC Docket No. 02-0864 (June 9, 2004). Likewise, the FCC was very clear, however, that early termination charges can be assessed if applicable. TRO, ¶696. XO's claim that such charges should not attach must therefore fail.

As to XO's assertion that an "ASR-driven process" for ordering should be adopted, the Staff knows of no reason to require adoption of such a process.

XO Issue No. 5 – Qualifying Service

As a general observation the Staff notes that the FCC's qualifying services determinations were vacated by the USTA II decision. *See* USTA II, 359 F.3d at 594 ("We vacate the Commission's distinction between qualifying and non-qualifying services[.]"). To the extent that this finding remains in effect, the discussion of what constitutes the offering or provision of a qualifying service may be unnecessary.

[4] The USTA II court remanded this issue to the FCC for further consideration. USTA II, 359 F.3d at 593. At such time as the FCC renders a decision on remand, and to the extent that such decision constitutes a change of law under the parties' interconnection agreement, XO may certainly invoke its rights under the change of law provision.

Moreover, in the event that the USTA II determination remains in effect on this point, XO's position must prevail. This is because, if there is no "qualifying service" requirement, a requesting carrier can properly request UNEs to provide any telecommunications service. *See* USTA II, 359 F.3d at 591 (court determines that "services" as used in Section 251(d)(2) of the federal Telecommunications Act means "telecommunications services" as opposed to local services; can include long-distance services).

XO contends that the *Triennial Review Order* permits it to use a UNE to provide non-qualifying service, so long as it uses the UNE to provide a qualifying service, and argues that SBC's contract proposals, which include certification and audit provisions, are intended to impede this. XO IB at 15-16. XO further objects to SBC's definition of "local calling area", which, it argues, would put it at a competitive disadvantage. Id. at 16-17.

SBC argues that to use a UNE to provide a non-qualifying service, a requesting carrier must actually be a "telecommunication carrier" within the meaning of the federal Act, and must also actually provide, as opposed to merely offer to provide, a qualifying service using the UNE in question. SBC IB at 20-22. Moreover, posits SBC, the requesting carrier must offer the qualifying service on a common carrier basis. Id. at 22.

SBC contends that its certification proposal is less draconian than XO represents it to be, inasmuch as certification would only be required in the event that SBC requested it. SBC IB at 22.

Finally, SBC states that its definition of the word "local" is reasonable, inasmuch as it, in SBC's view, best reflects the requirement that a qualifying service is one provided in direct competition with an ILEC core service. SBC IB at 23. This, asserts SBC, is especially true in light of the fact that XO offers no counterproposal. Id.

The Staff first observes that SBC's definition of "local" appears not to serve the purpose that it alleges. First, the Staff is far from certain what constitutes an SBC "local calling area." Second, the Staff credits XO's assertion that SBC has in the past provided, and continues to provide, services such as FX that go well outside of a given customer's calling area, and indeed throughout the MSA. Accordingly, the Staff sees no reason to adopt this definition; defining local as "within the customer's MSA" seems proper under the circumstances.

SBC's certification and audit proposals, on the other hand, are not unreasonable. As SBC notes, the qualifying service requirement, upon which the availability of UNEs is conditioned, would be rendered meaningless if there was no mechanism in place to determine whether the requesting carrier was indeed in compliance. Staff has no objection to the adoption of these provisions.

XO Issue No. 6 – Eligibility and Certification Requirements

XO argues that it should be permitted to self-certify its eligibility to use EELs through the use of a letter to SBC that contains the appropriate representations, contending that this is all the *Triennial Review Order* requires. XO IB at 17-18. It objects to SBC's proposal, which requires certification on a form of SBC's devising, which XO has not seen (and which, XO asserts, SBC has yet to devise); and which, moreover, according to XO, well exceeds in scope the *Triennial Review Order's* requirements. XO IB at 18.

SBC contends that, as a more or less initial matter, it is no longer required to convert special access circuits to EELs at all, and it therefore can require any conditions that it considers proper when offering them.[5] SBC IB at 24-25. It nonetheless contends that its proposal is consistent with the *Triennial Review Order*, and XO's is not. Id. at 25.

SBC asserts that the *Triennial Review Order* eliminates entrance facilities as UNEs, contrary to XO's proposal. SBC IB at 25. SBC next observes that XO's desire to self certify eligibility in a manner of its own choosing might conceivably include "the back of a cocktail napkin", and urges the Commission to require XO to use a standardized form. Id. at 26. SBC further argues that XO should be required to maintain certain information, including "call detail records, Local Telephone Number assignment documentation, and switch assignment documentation," in support of it certification of eligibility, contending that the *Triennial Review Order* mandates such a requirement. Id.

SBC further objects to XO's proposal that it be permitted to continue to use EELs after an audit has determined them to be non-qualifying until such time as the Commission or FCC confirms the audit results. SBC IB at 27. SBC contends that XO's reservations are contrary to the *Triennial Review Order*, and, inasmuch as the auditor is mutually selected and independent, quite unnecessary in any case. Id.

SBC takes further issue with XO's objection to SBC's proposal that EELs be required to terminate in a collocation arrangement. SBC IB at 29. SBC argues that the *Triennial Review Order* specifically requires this. Id. SBC also objects to XO's proposal

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[5] SBC states that, when the USTA II decision was issued, it was in the process of negotiating with XO, and the parties had already made proposals regarding EELS, including proposals related to certification and eligibility. SBC IB at 25, n. 11. SBC states that it will withdraw this proposal if its positions on several matters are not adopted. Precisely how it proposes to withdraw such proposals after the Commission has issued an arbitration award, or what practical significance this would have, is not clear to the Staff.

that SBC's failure to enforce its right to challenge XO's certification be deemed a waiver thereof. Id. at 30.

To the extent that conversions are proper, XO's position, regarding the form that certification ought to take, should be adopted, as Staff noted in its Initial Brief. Staff IB at 52. The *Triennial Review Order* makes it abundantly clear that certification may take the form of a letter. TRO, ¶624. There appears to be no particular danger that XO will resort to cocktail napkins, placemats, ATM slips, or suchlike random scraps of paper.

It is just as clear from the *Triennial Review Order* that SBC's position regarding whether entrance facilities are UNEs is correct and should be adopted.[6] TRO, ¶366, n. 1116.

Moreover, SBC's recommendations regarding document and information retention appear to be reasonable, and should be adopted. Under the *Triennial Review Order*, ILECs may request yearly audits, and CLECs are required to retain information necessary to the conduct of such audits. TRO, ¶629. In addition, CLECs are clearly required to re-convert non-compliant EELs upon the auditor's adverse finding. TRO, ¶¶627-28. Thus, XO's proposal must be rejected.

XO Issue No. 7 – Audits

XO seeks to limit the right of SBC to conduct audits to determine whether circuits certified by CLECS as eligible are in fact eligible. *See, generally*, XO IB at 19, *et seq*. XO contends that, in the *Triennial Review Order*, the FCC gave state Commissions authority to "address implementation of … audits" conducted by ILECs. XO IB at 20. It

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[6] The FCC's decision to exclude entrance facilities was remanded, but not vacated. USTA II, 359 F.3d at 586, 594. Accordingly, the FCC conclusion remains in effect.

contends that its proposal, which would limit SBC's audits to those "circuits with which SBC has a specific issue is consistent with the FCC's stated concerns with "the potential for abusive or unfounded audits." Id.

SBC, in contrast contends that the *Triennial Review Order* affords it a right to conduct general audits on a yearly basis. SBC IB at 30.

SBC is correct. The *Triennial Review Order* authorizes ILECs to, at their election, retain auditors and conduct annual audits to determine "compliance with the qualifying service eligibility criteria[.]" TRO, ¶624. Further, the FCC "conclude[d] that an annual audit right strikes the appropriate balance between the incumbent LECs' need for usage information and risk of illegitimate audits that impose costs on qualifying carriers." Id.

XO's assertion that state Commissions are authorized to address certain implementation issues regarding eligibility audits is correct as far as it goes, which is not far at all. The FCC determined that state Commissions are indeed authorized to deal with certain implementation matters, such as what constitutes an "independent" auditor, and whether the auditor selected by the ILEC is independent. TRO, ¶623. This appears to the Staff to be a far cry from actually dictating to the ILEC what the scope of the audit, as XO would have it.

It is clear that the *Triennial Review Order's* findings in this regard contemplate a regular series of audits in the normal and ordinary course of business, rather than a dispute resolution process. The *Triennial Review Order* indicates that audits may be conducted at the ILEC's election, and on a regular basis, without any particularized suspicion that the CLEC being audited is improperly using EELs, or any allegations that this is the case. *See, generally,* TRO, ¶¶623-27. In other words, this cannot be a dispute resolution process, simply because it can be invoked even if there is no dispute.

SBC Issue No. 1:

(a) Under what circumstances may SBC Illinois discontinue offering a network element that no longer is required to be unbundled?

(b) Under the TRO, may either party change the change of law language?

The Staff's Position

Subissue (a): In its Initial brief, SBC argues that its proposed contract language:

> [P]rovides that SBC Illinois is required to provide only 'Lawful UNEs,' defined as 'UNEs that SBC Illinois is required to provide pursuant to Section 251(c)(3) of the Act, as determined by lawful and effective orders and rules of the [ICC] that are necessary to further competition in the provision of telephone exchange service or exchange access and that are not inconsistent with [1996 Act] of the FCC's regulations to implement the [1996 Act].' SBC Ill. Section 1.1. Network elements that do not satisfy this standard, but were previously provided as UNEs, are considered 'declassified.' This language appropriately reflects SBC Illinois' obligations to provide UNEs under the TRO and the 1996 Act.

SBC IB, at 35-36.

It is the Staff's position that SBC has over-reached in various respects with its proposed "Lawful UNE" language. As the Staff noted in its Initial Brief, SBC "appears to reserve to itself the right to determine – and, indeed, from time to time *re*-determine – what constitutes a 'Lawful UNE.'" The Staff will not re-hash all of the arguments it made in its Initial Brief, but will note that SBC's proposed language would effectively leave to SBC alone the right to, not only to unilaterally determine exactly which UNEs it is required to provide under Section 251(c)(3) of TA 96, but also unilaterally determine: (i) whether the relevant Orders of this Commission are necessary to further competition, and (ii) whether the relevant Orders of this Commission are consistent with TA 96. SBC cannot reserve to itself the right to make federal preemption determinations, which is effectively what its proposed language would allow.

Regarding whether SBC should be allowed to unilaterally determine exactly which UNEs it is required to provide under Section 251(c)(3) of TA 96, the FCC's expressly provided in the TRO that it had declined to take the "extraordinary step" of "interfering with [the] contract process," which is the "very essence" of sections 251 and 252. TRO, ¶ 701. The Staff recommends that the Commission not interfere with the parties right to contract and allow the parties to an ICA to address any changes of law through negotiations under their existing change of law provisions.

The Staff, moreover, as noted in its Initial Brief (at 62-63), objects to SBC's proposed language because it fails to reference any obligations SBC may have under state law or under federal law other than Section 251(c). The Staff, consequently, recommends that the Commission reject SBC's over-reaching proposed language and adopt XO's proposed language or language consistent with the Staff's position.

SBC Issue No. 2:

(a) What is the appropriate transition and notification process for UNEs that no longer have to be unbundled?

(b) Under the TRO, may either party change the change of law provision?

The Staff's Position

As the Staff stated immediately above, in SBC Issue No. 1, the Staff recommends that the Commission, like the FCC has already done in the TRO, expressly decline to take the "extraordinary step" of "interfering with [the] contract process," which is the "very essence" of sections 251 and 252. TRO, ¶ 701. XO, moreover, pointed out (*see* Revised Att. 1 to XO IB, at 8) that the Commission in a somewhat recent arbitration, rejected an SBC proposed change of law provision that would have "immediately invalidated, modified or stayed with consistent with" ongoing regulatory changes. In reaching its conclusion, the Commission reasoned:

> In contrast to the immediate disability imposed by the foregoing [SBC] text, Sage's intervening law provisions provide for good faith renegotiation between the parties, at the discretionary request of either party. Because it would not immediately disrupt the working relationship created by the ICA, Sage's proposal is markedly superior. It would allow the parties a reasonable opportunity to consider the ramifications of regulatory change and arrange for a smooth transition accommodating such change. Moreover, no transition may be warranted, since changes to regulatory requirements and standards do not always obligate carriers to rearrange the rights and duties they establish by contract.

Arbitration Decision, Petition for Arbitration of an Interconnection Agreement with Illinois Bell telephone Company d/b/a SBC Illinois under Section 252(b) of the Telecommunications Act of 1996, ICC Docket No. 03-0570 (Dec. 9, 2003), at 26.

The Staff found the Commission's reasoning in the Sage-SBC Arbitration Decision sound then and it is the Staff's position that such reasoning would be sound now applied to this issue in the instant arbitration. The Staff, moreover, as noted in its Initial Brief (at 64-65), objects to SBC's proposed language because it fails to reference any obligations SBC may have under state law or under federal law other than Section 251(c). The Staff, consequently, recommends that the Commission reject SBC's over-reaching proposed language and adopt either XO's proposed language, which overall is more reasonable than SBC's, or language consistent with the Staff's position.

SBC Issue No. 3: Loops

(a) When SBC retires copper loops or subloops must it provision an alternative service over any available facility?[7]

(b) Should the ICA include terms and conditions related to the loop "caps" set forth in 47 CFR § 51.319(a)(5)(iii)?

(c) Should the pricing appendix contain pricing for declassified subloops?

<u>The Staff's Position</u>

Subissue (a): First, regarding whether SBC must provide an alternative service when it retires a copper loop and replaces it with a fiber-to-the-home loop ("FTTP"), in its Initial Brief, the Staff stated that: "The FCC clearly requires SBC to provide an alternative service when it retires copper loops or subloops. 47 C.F.R. § 51.319(a)(3)(ii)(C) ('An incumbent LEC that retires the copper loop . . . shall provide nondiscriminatory access to a 64 kilobits per second transmission path capable of voice grade service over the fiber-to-the-home loop on an unbundled basis.')."

SBC, however, in its Initial Brief, interprets FCC Rule 51.319(a)(3) to *only* require an ILEC to meet the disclosure requirements found in FCC Rule 51.319(a)(3)(*iii*) (emphasis added). SBC IB, at 50-52. SBC fails to address the requirements of FCC Rule 51.319(a)(3)(*ii*)(*C*) (emphasis added), despite the fact that its own proposed ICA contains language that tracks the requirements of FCC Rule 51.319(a)(3)(ii)(C). Section 3.1.3.2.3 of SBC's Ex. 3.0, filed with its Response to XO's Petition for Arbitration, provides, in full, the following:

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[7] Apparently, the former SBC Issue 3(a) regarding House and Riser Cable was settled by the parties prior to XO and SBC filing their Initial Briefs. Staff, however, was unaware that former SBC Issue 3(a) had been settled and thus addressed it in its Initial Brief.

> If SBC Illinois retires the copper loop pursuant to Section 3.1.3.3 of this Attachment to Amendment and Section 51.319(a)(3)(iii) of the FCC's rules, SBC Illinois shall provide nondiscriminatory access to a 64 kilobits per second transmission path capable of voice grade service over the FTTH loop on an unbundled basis.

SBC, while appearing to ignore its own proposed language contained in Section 3.1.3.2.3, states that: "the purpose of [XO's] language is apparently to require SBC Illinois to develop new offerings for CLECs before it can retire copper loops. This provision finds no support in the TRO." SBC IB, at 51. It appears to the Staff, however, that XO's proposed language would not require SBC "to develop new offerings" but would only "ensure continued access to an unbundled transmission path suitable for providing narrowband services to customers served by FTTH loops." <u>TRO</u>, at ¶ 277.

SBC also appears to be wrong when it claims that XO's position has no support in the TRO. In fact, ¶ 277 of the TRO provides in full the following:

> We agree with Corning and Verizon, however, that in a FTTH overbuild situation **we must ensure continued access to an unbundled transmission path suitable for providing narrowband services to customers served by FTTH loops**. The record indicates that deployment of overbuild FTTH loops could act as an additional obstacle to competitive LECs seeking to provide certain services to the mass market. By its nature, an overbuild FTTH deployment enables an incumbent LEC to replace and ultimately deny access to the already existing copper loops that competitive LECs were using to serve mass market customers. In this regard, incumbent LECs potentially have an entry barrier within their sole control (*i.e.*, the decision to replace pre-existing copper loops with FTTH). In order to ensure continued narrowband access in this situation, incumbent LECs have the option to either (1) keep the existing copper loop connected to a particular customer after deploying FTTH; or **(2) in situations where the incumbent LEC elects to retire the copper loop, it must provide unbundled access to a 64 kbps transmission path over its FTTH loop**. Under the first option, we do not require incumbent LECs to incur relief and rehabilitation costs for that loop unless a competitive LEC requests unbundled access to it and such loop is placed back into service. We conclude that these measures counteract any

> obstacles competitive LECs face in overbuild FTTH situations much like other provisions of the Act offset certain entry barriers. **We note that this is a very limited requirement intended only to ensure continued access to a local loop suitable for providing narrowband services to the mass market in situations where an incumbent LEC has deployed overbuild FTTH and elected to retire the pre-existing copper loops**.

TRO, at ¶ 277.

The FCC's discussion in ¶ 277 of the TRO is implemented in FCC Rule 51.319(a)(3)(ii)(C). FCC Rule 51.319(a)(3) provides, in relevant part, the following:

> (3) Fiber-to-the-home loops. A fiber-to-the-home loop is a local loop consisting entirely of fiber optic cable, whether dark or lit, and serving a residential end user's customer premises.
>
> > (i) New builds. An incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop on an unbundled basis when the incumbent LEC deploys such a loop to a residential unit that previously has not been served by any loop facility. (ii) Overbuilds. An incumbent LEC is not required to provide nondiscriminatory access to a fiber-to-the-home loop on an unbundled basis when the incumbent LEC has deployed such a loop parallel to, or in replacement of, an existing copper loop facility, except that:
> >
> > > (A) The incumbent LEC must maintain the existing copper loop connected to the particular customer premises after deploying the fiber-to-the-home loop and provide nondiscriminatory access to that copper loop on an unbundled basis unless the incumbent LEC retires the copper loop pursuant to paragraph (a)(3)(iii) of this section.
> > >
> > > * * *
> > >
> > > (C) An incumbent LEC that retires the copper loop pursuant to paragraph (a)(3)(iii) of this section shall provide nondiscriminatory access to a 64 kilobits per second transmission path capable of voice grade service over the fiber-to-the home loop on an unbundled basis.
> > >
> > > * * *

> (iii) Retirement of copper loops or copper subloops. Prior to retiring any copper loop or copper subloop that has been replaced with a fiber-to-the-home loop, an incumbent LEC must comply with:
>
> > (A) The network disclosure requirements set forth in section 251(c)(5) of the Act and in § 51.325 through § 51.335; and
> >
> > (B) Any applicable state requirements.

47 C.F.R. § 51.319(a)(3)(ii)(C).

Although FCC Rule 51.319(a)(3) may not be a model of clarity, it, in conjunction with the FCC's discussion in ¶ 277 of the TRO, appears to clearly support XO's proposed language. Staff, consequently, recommends that the Commission either adopt XO's proposed language or language reflecting the requirements of FCC Rule 51.319(a)(3).

Subissue (b): XO argues, in its Initial Brief, that SBC's proposed language goes too far, and is thus "unreasonable" and "unnecessary," regarding what SBC should do when it receives an order that would exceed the FCC's DS3 cap. XO IB, at 36. Rather than providing its own proposed language, XO proposes that this issue should be determined "by engaging in industry wide discussions to develop a mutually acceptable process."

As noted in its Initial Brief, the Staff agreed with both parties that the ICA should reflect the FCC's DS3 caps found in the FCC's Rule 51.319(a)(5)(iii). Staff Initial Brief, at 70. The Staff, however, also agrees with SBC that "there is currently no FCC rule requiring access to high-capacity loops, because the DC Circuit vacated that rule." SBC IB, at 52, n. 21. The Staff, moreover, also consistently supported XO's proposed language that referenced SBC state law obligations to provide certain UNEs. *See e.g.*, Staff IB, at 62-63 (SBC Issue 1), and 64-65 (SBC Issue 2).

Under both Illinois state law and the relevant federal law, SBC offers DS3 loops pursuant to tariffs. *See* Order, Illinois Bell Telephone Company: Filing to Increase Unbundled Loop and Nonrecurring Rates, ICC Docket No. 02-0864 (June 9, 2004); see also ILL. C. C. 20, Part 19, Section 2, Sheet No. 31. Because SBC has a lawful and effective tariff on file in Illinois implementing this Commission's decisions interpreting both the Illinois Public Utilities Act ("PUA") and relevant federal law, the Staff recommends that the Commission look to this tariff as a guideline for certain aspects of the Commission's Arbitration Decision in this proceeding. *See* ILL. C. C. No. 20, Part 19, Section 2.

Further, Section 13-801 of the PUA imposes certain unbundling obligations on SBC. The Commission is currently, in proceedings on reopening in Illinois Bell Telephone Company: Filing to Implement Tariff Provisions Related to Section 13-801 of the Public Utilities Act, ICC Docket No. 01-0614, considering what obligations are imposed on SBC by this section of the Public Utilities Act, independent of any federal law obligations. It is conceivable that this proceeding or other actions taken by SBC in response to changes in state or federal law could result in the modification of ILL. C. C. No. 20, Part 19, Section 2. Staff, accordingly, also recommends that the Commission make clear that if it approves a modification of this tariff in another proceeding, based on changes in law that underpin it, that neither party is prevented from arguing that such tariff changes are changes in law under this contract.

Subissue (c): XO argues that SBC's proposed language would "prevent XO from ordering subloops beyond those that the FCC found does not have to provide to competitors." XO IB, at 36-37. XO, however, fails to identify which of the subloops that SBC has identified are those subloops that XO objects to as being beyond those that the FCC has declassified. SBC proposes deleting the subloop pricing for the following three UNEs that believes are no longer required to be provided as a UNE to requesting CLECs: CO to RT, CO to SAI, and CO to terminal. SBC IB, at 54.

More to the point, however, the Staff points out that, according to the Staff's review, under state law SBC currently provides all of the SBC identified "declassified" subloops via currently effective tariffs, with the exception of most DS3 subloops and non DS3 subloops between the CO and RT. The exception to the exception is that SBC is required to, and does offer under a currently effective tariff DS3 subloops from the CO to RT. *See* ILL. C.C. No. 20, Part 19, Section 16 (DS3 subloops – Sheets 6 and 13; all CO to SAI types except DS3s – Sheets 10-12; and all CO to terminal types except DS3s – Sheets 10-12). The Staff recommends that the Commission look to this tariff as a guideline for certain aspects of the Commission's Arbitration Decision. The Staff also recommends that the Commission make clear that if it approves a modification of this tariff in another proceeding, based on changes in law that underpin it, that neither party is prevented from arguing that such tariff changes are changes in law under this ICA.

SBC Issue No. 4 (Advanced Services):

(**a)** **What terms and conditions should apply to hybrid loops?**
(b) **What terms and conditions should apply to Line Conditioning?**
(c) **What terms and conditions should apply to HFPL?**

<u>The Staff's Position</u>

Subissue (a): The Staff agrees with XO that SBC's proposed language for hybrid loops fatally ignores other applicable law, including any unbundling obligations that SBC may have under section 271 of Federal Telecommunications Act ("FTA" or

“TA 96”) or under applicable state law. SBC, on the other hand, claims that XO’s “invitation” to “thwart” the federal policy will “run afoul of long-standing federal preemption principles.” SBC IB, at 57. As this Commission has pointed out, however, if SBC desires an Illinois state law provision to be preempted, it should follow the process expressly provided for preemption of state law in Section 253(d) of TA 96. *See Order*, Filing to implement tariff provisions related to Section 13-801 of the Public Utilities Act, ICC Docket No. 01-0164 (June 11, 2002) (“13-801 Order”), at 18-19.

SBC also contends that XO’s proposal to require hybrid loops at TELRIC rates pursuant to Section 271 must be rejected by the Commission as it is “flatly contrary to law.” SBC IB, at 57. Staff agrees that there is no current federal requirement that requires SBC to provide hybrid loops under Section 271 at rates, terms, and conditions consistent with Section 251(c)(3) UNEs. For example, the FCC stated in the TRO that "[u]nder the no impairment scenario, section 271 requires these elements to be unbundled, but not using the statutorily mandated rate under Section 252." TRO at ¶ 656 (Section 252(d)(1) establishes criteria that rates for 251(c)(3) UNEs must meet.).

However, the changes in the FCC Rules resulting from the TRO and USTA II do not necessarily mean that SBC is not required to provide hybrid loops to XO. The TRO and USTA II decisions result in the elimination, with respect to hybrid loops, of *federal* rules implementing Section 251(c) of the TA 96. Under applicable *state law*, however, SBC currently is required to, and does offer loops (including hybrid loops) available in Illinois in ILL. C. C. 20, Part 19, Section 2.[8]

[8] Again, the Staff recommends that the Commission look to this tariff as a guideline for certain aspects of the Commission’s Arbitration Decision. The Staff also recommends that the Commission make clear that if it approves a modification of this tariff in another proceeding, based on changes in law that underpin it, that neither party is prevented from arguing that such tariff changes are changes in law under this ICA.

Subissue (b): As noted above, under SBC Issue No. 1, the Staff agrees with XO that SBC's proposed "Lawful UNEs" concept is objectionable for the reasons articulated above in SBC Issue 1. Beyond the "Lawful UNEs" issue, and in light of XO's position in its Initial Brief (at 37-38), it appears to Staff that there are no other open issues regarding line conditioning currently before the Commission for resolution.

Subissue (c): The Staff agrees with SBC that HFPL, or line sharing, is not a Section 271 checklist item. The Staff, thus, sees no reason for XO's proposed language requiring SBC to provide HFPL to the extent required by Section 271. Likewise, the Staff also disagrees with XO's argument that state law requires SBC to provide HFPL, or line sharing. Unlike hybrid loops and dark fiber, the Commission did not implement a state law requirement that SBC provide HFPL under mandatory statutory language found in the PUA, but, rather, the Commission exercised its prerogative authority under the discretionary language found in Section 13-506.6 of the PUA, which exercise of authority was then consistent with existing federal law. The Commission, moreover, re-opened ICC Docket No. 00-0393 because subsequent to the FCC issuing the TRO "changes to the federal scheme indicates several areas which implicate the need for a reapplication of Illinois and federal law to the issues addressed by this Commission in earlier orders in this docket."[9] Although a Final Order has not yet issued in ICC Docket No. 00-0393 (On Reopening), it is the Staff's position that SBC is not required to provide HFPL, or line sharing, under a mandatory statutory provision of the PUA. The Staff again notes that SBC currently is required to, and does provide

[9] *See Order on Reopening*, Proposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing service, ICC Docket No. 00-0393 (On Remand) (Nov. 25, 2003), at 2.

HFPL offerings under an Illinois tariff in ILL. C. C. 20, Part 19, Section 2.[10] The Staff, accordingly, recommends that the Commission adopt language consistent with the Staff's positions regarding HFPL.

SBC Issue No. 5:

What terms and conditions should apply to SBC's provision of Dark Fiber Loop and Dark Fiber Transport?

<u>The Staff's Position</u>

First, as the Staff noted in its Initial Brief, and above, the Staff finds objectionable SBC's proposed language referencing "Lawful UNEs" and its proposed "declassification" process for the reasons articulated above under SBC Issues No. 1 and 2, including the fact that SBC's proposed language does not reference state law unbundling obligations. Second, as noted in its Initial Brief, the Staff objects to XO's proposed language that requires a "final and non-appealable order" for the reasons articulated by SBC. The Staff recommends that if and where the Commission adopts XO proposed language that such language be replaced with the term "lawful order" or "lawful and effective order."

Regarding dark fiber loops, as the Staff noted in its Initial Brief, the FCC has referred to dark fiber loops in a manner that does little to technologically distinguish dark fiber loops from dark fiber transport. Staff IB, at 79. The two types of dark fiber are, however, distinguished by location in the FCC rules. For example, in defining dark fiber transport the FCC identifies dark fiber transport as "unactivated optical interoffice

[10] Again, the Staff recommends that the Commission look to this tariff as a guideline for certain aspects of the Commission's Arbitration Decision. The Staff also recommends that the Commission make clear that if it approves a modification of this tariff in another proceeding, based on changes in law that underpin it, that neither party is prevented from arguing that such tariff changes are changes in law under this ICA.

transmission facilities", but identifies a loop, including dark fiber loop, as "… a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises." See Rules 51.319(e)(3)(i)(A) and TRO, at n. 620, respectively. Furthermore, the FCC has clearly treated dark fiber loops and dark fiber transport distinctly. For example, in the self-provisioning trigger for dark fiber loops, found in FCC Rule 51.319(a)(6)(i), no impairment would be found where *two* or more CLECs have deployed dark fiber facilities at a specific customer location. On the other hand, in the self-provisioning trigger for dark fiber transport, found in FCC Rule 51.319(e)(3)(i)(A), no impairment would be found where *three* or more CLECs have deployed dark fiber facilities along a specific route." With such distinctions in mind, the Staff agrees that SBC's proposed language defining dark fiber loop in section 2.6 is consistent with the TRO. In fact, the Staff finds that SBC's proposed language adds a degree of clarity, overall, that the Staff finds useful in this rather foggy landscape.

Regarding SBC's proposed dark fiber transport "provisioning" language in section 3.5.3.1, the Staff objects to the limiting language requiring CLEC collocation space in "each SBC-Illinois CO where the requested dark fiber(s) terminate." In the Staff's view, SBC's proposed language in 3.5.3.1 imposes limitations on SBC's provisioning of dark fiber transport that go beyond the limitations contemplated in the TRO. The FCC states that "carriers that request dark fiber transport, used to provide relatively high capacity transport, must purchase and deploy necessary electronics and collocations …" Thus, SBC's proposal to impose a collocation requirement when provisioning dark fiber transport is consistent with the TRO. However, SBC's proposal to impose a collocation requirement in "each" CO where the requested dark fiber(s) terminate is not.

The FCC stated that: "once supplied with the proper electronics and activated, dark fiber transport is used by carriers for the same purposes as dedicated transport." TRO at ¶ 381. This analogy is informative because just like dedicated transport a transmission path between two SBC COs created using dark fiber may pass through one or more intermediate COs. See 51.319(e). As XO notes, SBC's proposed language could be interpreted to mean that XO must collocate, not just at the end points of such a transmission path, but in every intermediate office along that path. It is the Staff's position that XO would need to collocate at the SBC COs where the requested dark fiber ends, but may not need to collocate at every intermediate CO in order to comply with the TRO. For example, if XO requests dark fiber to connect its end-user customer to SBC COs A and CO C, but in order to meet this request SBC need only perform a routine network modification to connect two dark fibers into one (*e.g.*, one from CO A to CO B and one from CO B to CO C), then XO should only be required to collocate at CO A and CO C. Of course, if XO also wanted to connect to loops at CO B or connecting the two dark fibers at CO B required more than a routine network modification, then XO should be required to also collocate at CO B.

Regardless of the various interpretations of the TRO requirements, the D.C. Circuit Court vacated the FCC's TRO impairment decisions for dark fiber. USTA II at *61.* Thus, Staff concurs with SBC that there is currently no FCC rule requiring SBC to provide unbundled dark fiber under Section 251(c)(3) of the 1996 Act. SBC Initial Brief at 65*,* n*. 29.* Therefore, determining what requirements are or are not placed on SBC's provision of dark fiber is under current law merely an academic exercise --- one that the Commission need not engage in. At this point in time, SBC is not required to provide dark fiber under FCC rules implementing Section 251(c) (3)of the 96 Act.

However, the TRO and USTA II decisions result in the elimination, with respect to dark fiber, of *federal* rules implementing Section 251(c) (3) of the 96 Act. Regardless of whether elimination of this particular federal rule eliminates SBC's obligations under federal law, the Staff again points out that SBC currently is required to, and does offer unbundled dark fiber under Illinois law through ILL. C. C. No. 20, Part 20, Section 18.[11]

SBC Issue No. 6: Interoffice Facilities

(a) **May XO obtain from SBC Illinois at TELRIC rates Unbundled Interoffice Facilities (Dedicated Transport and/or Dark Fiber Transport) to connect the CLEC premises or Point of Presence (POP).**

(b) **Is SBC obligated to provide TELRIC-based transmission facilities for interconnection and the exchange of traffic pursuant to Section 251(c)(2)?**

(c) **What terms and conditions should apply to the DS3 dedicated transport caps?**

(d) **Should the pricing schedule include pricing for entrance facilities, OC3, OC12 and OC48 dedicated transport, cross connects and multiplexing?**

The Staff's Position

[11] Again, the Staff recommends that the Commission look to this tariff as a guideline for certain aspects of the Commission's Arbitration Decision. The Staff also recommends that the Commission make clear that if it approves a modification of this tariff in another proceeding, based on changes in law that underpin it, that neither party is prevented from arguing that such tariff changes are changes in law under this ICA.

Subissues (a), (b) and (d): In its Initial Brief (at 88), the Staff summarized the FCC's findings regarding the distinction between (i) dedicated transport and (ii) interconnection transport facilities as in [par] 366 of the TRO as follows:

> [I]t would appear that entrance facilities 'that simply connect a competing carrier's network to the incumbent LEC's network' are not required to be unbundled by SBC and provided (at TELRIC rates) under section 251(c)(3).
>
> The Staff concluded that:
>
> [T]ransmission facilities that connect SBC switches or wire centers to XO's premises or point of presence ("POP") are not required to be unbundled and provided by SBC to XO at TELRIC rates under section 251(c)(3), but, rather, SBC is required to provide XO such facilities under its obligations to provide interconnection under 251(c)(2), at cost-based rates.

Staff IB, at 88.

SBC appears to agree with the Staff's conclusions. SBC states that Section 251(c)(2) does not require ILECs to provide transmission facilities for interconnection, but only requires interconnection. SBC IB, at 71. SBC also cites FCC Rule 5 to support its position that interconnection does not include the transport and termination of traffic. *Id*. SBC also notes that FCC Rule 305 requires only that an ILEC must provide interconnection to a requesting CLEC at any technically feasible point "within" the ILEC's network. Id., at 72. The Staff agrees with SBC's interpretation of its Section 251(c)(2) interconnection obligations. SBC then gets to what the Staff believes is the heart of the matter when it objects to XO's request that SBC "provide an SBC Illinois facility that extends to 'the CLEC premise or Point of Presence ("POP") – but that of course is not a point 'within the incumbent LEC's network.'" *Id*.

Unfortunately, however, because the parties have presented no evidence regarding what, exactly, constitutes the transmission facilities at issue and exactly where in the respective parties' networks these facilities would be located, the Staff offers no opinion on the respective proposed language of the parties. Beyond the various TRO related arguments that SBC provides the Commission on this issue, the Staff agrees with SBC that the FCC's TRO rules on interoffice transport were vacated by the D.C. Circuit Court in USTA II. SBC IB, at 69, n. 30. Regardless of the various *federal* law issues noted immediately above, the Staff again points out that SBC currently is required to, and does provide various transport offerings under *Illinois law* in ILL. C. C. 20, Part 19, Sections 12 (dedicated transport), 18 (dark fiber), and 20 (EELs).[12]

Subissue (c): See the Staff's position under SBC Subissue 3(b).

SBC Issue No. 7: Unbundled Local Switching and Shared Transport

Should the ICA include the TRO's modifications to the rules regarding the provision of unbundled local switching and shared transport?

<u>The Staff's Position</u>

XO states that "[w]hile XO is predominantly a facilities based carrier in Illinois and generally does not use unbundled switching and shared transport, it does not object to including language that reflects changes made by the TRO to the provision of unbundled switching and shared transport." Revised Att. 1 to XO IB, at 15. XO, nonetheless, does object to SBC's proposed language because it fails to reference unbundling obligations under Section 271 or independent state law authority. *Id*. The

[12] Again, the Staff recommends that the Commission look to this tariff as a guideline for certain aspects of the Commission's Arbitration Decision. The Staff also recommends that the Commission make clear that if it approves a modification of this tariff in another proceeding, based on changes in law that underpin it, that neither party is prevented from arguing that such tariff changes are changes in law under this ICA.

Staff agrees with XO that the ICA should reference SBC's unbundling obligations beyond Section 251 of TA 96, including state law obligations.

The Staff also agrees with both SBC and XO (as far as XO did not object) that the ICA should include language "that reflects changes made by the TRO to the provision of unbundled switching and shared transport." *Id*. The Staff also agrees with SBC that USTA II vacated the FCC's Rules regarding mass market switching, certain high capacity loops, and dedicated transport. SBC IB, at 74, n. 31. Nonetheless, SBC, under its state law obligations, currently provides mass market switching and transport offerings in Illinois under tariff. *See e.g.,* ILL. C. C. 20, Part 19, Sections 3, 5, 15 and 21.[13]

The Staff also objects to XO's proposed language referencing a "final and non-appealable" finding of no impairment. The Staff continues to object to this phrase for the reasons SBC articulated in its Preliminary Positions and in its Initial Brief, at 40, n. 16. The Staff recommends that the Commission replace the XO proposed phrase "final and non-appealable" orders with "lawful and effective" orders wherever the Commission adopts XO proposed language containing the phrase. Staff IB, at 62.

Finally, XO objects to SBC's proposed language regarding a number of provisions that would require XO to "disclose information, including customer account information sufficient for SBC to make determinations under, and apply, the Enterprise Market Customer provisions." Revised Att. 1 to XO IB, at 16.

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[13] Again, the Staff recommends that the Commission look to this tariff as a guideline for certain aspects of the Commission's Arbitration Decision. The Staff also recommends that the Commission make clear that if it approves a modification of this tariff in another proceeding, based on changes in law that underpin it, that neither party is prevented from arguing that such tariff changes are changes in law under this ICA.

SBC Issue No. 8: Call-Related Databases

What terms and conditions should apply to call-related databases LIDB and CNAM, provided in conjunction with UNE-P?

The Staff's Position

The Staff takes no position on this issue other than to continue its objection to SBC's proposed language regarding "Lawful" UNEs and "declassification" of UNEs as articulated above under SBC Issues 1 and 2 and to XO's proposed language containing the phrase "final and non-appealable" as articulated above. The Staff, nonetheless, refers the Commission (if it finds it helpful) to relevant SBC Illinois tariffs. *See* ILL. C. C. 20, Part 19, Section 11 and 17.

SBC Issue No. 9: Signaling Networks

What terms and conditions should apply to SS7 provided in conjunction with UNE-P.

The Staff's Position

Beyond the positions that the Staff articulated in its Initial Brief (at 94-95), the Staff continues its objection to SBC's proposed language regarding "Lawful" UNEs as articulated above under SBC Issues 1 and 2. The Staff, nonetheless, refers the Commission (if it finds it helpful) to relevant SBC Illinois tariffs. *See* ILL. C. C. 20, Part 19, Section 9.

SBC Issue No. 10: **Advanced Intelligent Network (AIN)**

What terms and conditions should apply to the advanced Interlligent Network (AIN) provided in conjunction with UNE-P?

The Staff's Position

Like above in SBC Issue 9, the Staff continues its objection to SBC's proposed language regarding "Lawful" UNEs as articulated above under SBC Issues 1 and 2. The Staff, nonetheless, refers the Commission (if it finds it helpful) to relevant SBC Illinois tariffs. *See* ILL. C. C. 20, Part 19, Section 13.

SBC Issue No. 11 – Tariffs / Pick and Choose

SBC argues that the interconnection agreement ought to be binding on the parties, notwithstanding existing tariffs. SBC IB at 82, *et seq*. XO argues that it has a legal right to order from tariffs, even where its interconnection agreement provides for different terms or conditions. XO IB at 50-51.

The Staff endorses SBC's position, for the reasons set forth in its Initial Brief. *See* Staff IB at 99-100.

SBC Issue No. 12: **Effect of TRO Contract Amendment**

(a) Should the Cover Amendment clarify how the terms and conditions of the amendment replace the terms and conditions of the underlying agreement?

(b) Should the Cover Amendment reserve both parties' rights with respect to "remedies and arguments with respect to any rders, decisions, legislation or proceedings"?

The Staff's Position

Subissue (a): The Staff continues to object to SBC's proposed language on "Lawful" UNEs and the "Declassification" of UNEs as articulated the Staff's Initial

Brief and above, particularly in SBC Issues 1 and 2. The Staff, on balance, favors XO's proposed language.

Subissue (b): XO states that:

> There is no need for parties to reserve their rights with regard to remedies and arguments. As a matter of law, both parties have such rights and the proposed language by SBC is simply superfluous, as well as ambiguous.

Revised XO Att. 1 to XO IB, at 18. The Staff agrees with XO.

SBC's proposed language is, in the Staff's view, overly complicated and singularly unenlightening. For example, the SBC proposed language includes a reference to certain actions, "which the Parties have not yet fully incorporated into this agreement . . .," and then continues to list an absurdly large number of court and FCC decisions and orders, which SBC collectively refers to as "Government Actions." SBC proposed Section 11. Rather than listing a long list of "Government Actions," the Staff suggests a seemingly simple proposal based on an analogous solution that this Commission has adopted before, which is to pick a date certain – for example, a date such as February 19, 2003, which was the day *before* the FCC issued the Press Release and adopted the *TRO* Order, although it was not released until August 21, 2003, or any other appropriate date – that would set in time the "Government Actions" that were not incorporated into the ICA because the dates of these "Government Actions" would fall after the date certain. A party claiming that a change in law that occurred prior to the chosen date certain would then carry the burden of proof on the issue of whether that change could have been appropriately accommodated in the ICA. This proposal would also avoid any perceived need to list all of "Government Actions" currently contained in SBC's proposed language. *See e.g.*, <u>Arbitration Decision</u>, Petition for Arbitration of an Interconnection Agreement with Illinois Bell telephone Company d/b/a SBC Illinois under Section 252(b) of the Telecommunications Act of 1996, ICC Docket No. 03-0570 (Dec. 9, 2003), at 22-28.

SBC Issue No. 13 – Stay / reversal of Triennial Review Order

SBC proposes that:

> [I]f portions of the *TRO* are remanded to the FCC but *not* vacated, the provisions of the parties' agreement that relate to those remanded portions "shall remain in effect during the pendency of the remanded proceeding," unless those portions are otherwise "rendered invalid or are modified by a change of law event," in which case the parties' change of law provisions, or the declassification provisions if a UNE is declassified, will apply.

SBC IB at 88

XO argues that it would be premature to deal with the effect of the USTA II decision. XO IB at 53. It contends that the FCC will shortly issue interim rules addressing the matters that USTA II placed in issue. Id. It urges the Commission to reject SBC's proposals that are based upon the USTA II decision. Id.

XO seeks, as SBC notes, to avoid the effect of those changes of law that it finds unsatisfactory. *See* SBC IB at 88. Its conclusion that as-yet unreleased, and in any case interim, FCC regulations constitute a change of law, while a federal; Court of Appeals decision somehow does not, is inexplicable. Its apparent belief that a change of law – regardless of what that change might be – ought to entitle it to take services from tariffs, the SGAT, or the remaining effective terms of the agreement, is sheer opportunism. XO's contentions should be rejected.

SBC's are marginally preferable, but nonetheless have certain defects, foremost among which is its proposal that it be permitted to unilaterally declassify UNEs based upon changes of law that – in its unilateral view – permit such declassification, should likewise be rejected as significant overreaching.

The parties have negotiated a change of law provision, but both appear to the Staff to seek, in this proceeding, Commission authority to act unilaterally in the event of changes of law. The Commission should reject such attempts; changes of law should be implemented through negotiation (and, if necessary, arbitration), rather than unilateral action.

SBC Issue No. 14 – Performance Measures / Remedies

SBC proposes that if a UNE is declassified under its so-called "lawful UNEs" or "UNE declassification" proposal, it should not be required to satisfy performance measures or pay performance remedies. SBC IB at 89-90. XO contends that SBC should be required to do so. XO IB at 54-55.

The Staff concurs with XO. SBC's performance remedy plan is a Commission-approved bulwark against SBC's potential failure to honor its market-opening obligations after receiving Section 271 authority, and there is no reason, and indeed no basis, to depart from it. SBC is apparently willing to invoke Commission approval when, as with its BFR process and certain of its non-recurring charges, doing so will serve its purposes. It should, therefore, not seek to depart from the Commission-approved remedy plan.

WHEREFORE, for all of the reasons articulated above, the Staff of the Illinois Commerce Commission hereby requests that its recommendations to the Commission be adopted.

Respectfully submitted,

/s/__________________________

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